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5 UNITED STATES DISTRICT COURT  
6 EASTERN DISTRICT OF WASHINGTON

7 RANDY BUCHANAN AND  
8 DONNA BUCHANAN, individuals,

9 Plaintiffs,

10 v.

11 SIMPLOT FEEDERS, LLC, an Idaho  
12 limited liability company; and  
13 TYSON FRESH MEATS, INC., a  
14 Delaware corporation; and IBP, INC.,  
a Delaware corporation,

Defendants.

NO. 4:19-CV-5209-TOR

ORDER GRANTING IN PART AND  
DENYING IN PART DEFENDANT  
SIMPLOT FEEDERS' MOTION TO  
DISMISS

15  
16 BEFORE THE COURT is Defendant Simplot Feeders, LLC's Motion to  
17 Dismiss (ECF No. 16). The Motion was submitted for consideration without oral  
18 argument. The Court has reviewed the record and files herein, and is fully  
19 informed. For the reasons discussed below, the Motion is granted in part and  
20 denied in part.

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT  
SIMPLOT FEEDERS' MOTION TO DISMISS ~ 1

## BACKGROUND

The instant case concerns a concentrated animal farm operation and the byproducts' effect on the neighbors. Plaintiffs Randy and Donna Buchanan own approximately 320 acres of property adjacent to property owned by Defendant Simplot Feeders, LLC ("Defendant"), who owns and operates a cattle feeding and hay grinding operation. ECF No. 1 at 2-3, ¶¶ 4, 9; at 9, ¶ 35. According to Plaintiffs, Defendant's cattle feeding and hay grinding operation result in fugitive emissions comprised of dust and "manure particles containing pathogens, toxic air pollutants, and volatile organic compounds" along with an increase in flies and "foul and obnoxious odors crossing over and onto" Plaintiffs' property. ECF No. 1 at 6, ¶¶ 23-24, at 9, ¶¶ 33-34. Plaintiffs claim this has caused an economic impact on their farm and have made the "living and working conditions nearly unbearable." ECF No. 1 at 1-2, ¶ 2.

Plaintiff otherwise complain about slaughterhouse operations operated by Defendants Tyson Fresh Meats, Inc., and ISB, Inc., but this is not at issue for the pending Motion to Dismiss.

Plaintiffs filed suit on August 14, 2019, against Defendant and others – Tyson Fresh Meats, Inc., and IBP, Inc. – asserting a claim for negligence, negligence per se, common law nuisance, nuisance per se, and trespass. Plaintiffs

1 request injunctive relief, economic damages, and non-economic damages. ECF  
2 No. 1 at 2, ¶ 3.

### 3 STANDARD OF REVIEW

4 Federal Rule of Civil Procedure 12(b)(6) provides that a defendant may  
5 move to dismiss the complaint for “failure to state a claim upon which relief can be  
6 granted.” “The burden of demonstrating that no claim has been stated is upon the  
7 movant.” *Glanville v. McDonnell Douglas Corp.*, 845 F.2d 1029 (9th Cir. 1988).  
8 A motion to dismiss for failure to state a claim will be denied if the plaintiff alleges  
9 “sufficient factual matter, accepted as true, to ‘state a claim to relief that is  
10 plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell*  
11 *Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

12 While the plaintiff’s “allegations of material fact are taken as true and  
13 construed in the light most favorable to the plaintiff[,]” the plaintiff cannot rely on  
14 “conclusory allegations of law and unwarranted inferences [] to defeat a motion to  
15 dismiss for failure to state a claim.” *In re Stac Elecs. Sec. Litig.*, 89 F.3d 1399,  
16 1403 (9th Cir. 1996) (citation and brackets omitted). That is, the plaintiff must  
17 provide “more than labels and conclusions, and a formulaic recitation of the  
18 elements.” *Twombly*, 550 U.S. at 555. When deciding, the Court may consider the  
19 plaintiff’s allegations and any “materials incorporated into the complaint by  
20

reference . . . .” *Metzler Inv. GMBH v. Corinthian Colleges, Inc.*, 540 F.3d 1049, 1061 (9th Cir. 2008) (citation omitted).

A federal court may dismiss a complaint for failure to comply with the statute of limitations where “the running of the statute is apparent on the face of the complaint.” *Huynh v. Chase Manhattan Bank*, 465 F.3d 992, 997 (9th Cir. 2006) (quoting *Jablon v. Dean Witter & Co.*, 614 F.2d 677, 682 (9th Cir. 1980); citing *Supermail Cargo, Inc. v. United States*, 68 F.3d 1204, 1206 (9th Cir. 1995)).

## DISCUSSION

Plaintiffs are asserting a claim for negligence, negligence per se, common law nuisance, nuisance per se, and trespass. Defendant seeks dismissal of Plaintiffs’ claims for negligence, negligence per se, nuisance per se, and trespass.

### A. Negligence

“The elements of a negligence action are duty, breach, proximate cause, and damages.” *Mathis v. Ammons*, 84 Wash. App. 411, 415 (1996).

Duty is the duty to exercise ordinary care, or, alternatively phrased, the duty to exercise such care as a reasonable person would exercise under the same or similar circumstances. Breach is the failure to exercise ordinary care, or, alternatively phrased, the failure to exercise such care as a reasonable person would exercise under the same or similar circumstances. Breach is also called “negligence.”

*Id.* at 415-416. “Notwithstanding these elements, a statute may impose a duty that is additional to, and different from, the duty to exercise ordinary care.” *Id.* at 416.

1 A statute has this effect when it meets a four-part test drawn from the  
2 Restatement (Second) of Torts: The statute's purposes, exclusively or in  
3 part, must be (1) to protect a class of persons that includes the person whose  
4 interest is invaded; (2) to protect the particular interest invaded; (3) to  
5 protect that interest against the kind of harm that resulted; and (4) to protect  
6 that interest against the particular hazard from which the harm resulted.

7 *Id.* at 416. Except in limited circumstances – breach of a rule relating to electrical  
8 fire safety, the use of smoke alarms, or driving while under the influence – “[a]  
9 breach of a duty imposed by statute, ordinance, or administrative rule shall not be  
10 considered negligence per se, but may be considered by the trier of fact as evidence  
11 of negligence[.]” *Id.* at 417 (quoting RCW 5.40.050.)

12 As to the claim for negligence per se, Defendants contend that Washington  
13 only recognizes negligence per se in specific instances that are not applicable here.  
14 ECF No. 17 at 6-7. “Plaintiffs concede that their negligence per se claim does not  
15 meet the enumerated statutory bases and should be dismissed.” ECF No. 19 at 2.  
16 Accordingly, Plaintiffs’ negligence per se claim is dismissed.

17 As to the negligence claim, Defendant concedes that “Washington law  
18 permits a party to base a negligence claim (at least in part) on a statutory [or]  
19 regulatory violation[.]” but argues “federal courts mandate that a plaintiff identify  
20 the statutes [or] regulations that form the basis for tort claims in the complaint.”  
ECF No. 16 at 7. Defendant asserts that “Plaintiffs fail to cite any specific law,  
regulation, or standard that was violated” and that, because their “negligence

1 allegations rely solely on these unidentified violations, these claims also fail as a  
2 matter of law.” ECF No. 16 at 5-6.

3 The Court finds dismissal improper at this stage. Plaintiffs adequately pled  
4 that Defendant is not in compliance with the law and that the law is aimed at  
5 protecting neighboring persons – like Plaintiffs – from excess fugitive emissions of  
6 dust and particles, which may implicate health concerns:

7 The Defendants’ activities are regulated by the Department of Ecology and  
8 are subject to air quality standards. In particular, Simplot is required to  
9 control particulate matter emissions from its operations. The Department of  
10 Ecology (“Ecology”) established Fugitive Dust Control Guidelines and Best  
11 Management Practices for Beef Cattle Concentrated Animal Feeding  
12 Operation (“CAFO”), which are located in Washington Administrative Code  
13 173-400-040. Beef cattle CAFOs are required to develop fugitive dust  
14 control plans that are reviewed and adopted by Ecology. The purpose of the  
15 fugitive dust control plan is to reduce fugitive emissions from cattle pens  
16 and CAFO operations. The fugitive emissions are comprised of not only  
17 dust, but also manure particles containing pathogens, toxic air pollutants,  
18 and volatile organic compounds.

19 \* \* \*

20 Besides the obvious affect on the Plaintiffs’ quality of life, and their farming  
operations, the Defendants’ operations pose a health risk.

ECF No. 1 at 6-7, ¶ 23-24. Plaintiffs specifically pled that, in June 2016, the  
Department of Ecology “observed [Defendant] generating excessive dust” and  
“issued a Notice of Correction to Defendant” and that Defendant “has failed to take  
adequate steps to control fugitive dust and fugitive emissions.” ECF No. 1 at 6, ¶  
31, at 11, ¶ 42.

1 While this is not a detailed delineation of the statutes or regulations at issue,  
2 this is sufficient to put Defendant on notice as to the basis of Plaintiffs' complaint  
3 and gives rise to a plausible inference that Defendant is in fact violating the law  
4 given the Department of Ecology's alleged action and the allegation that Defendant  
5 has not curbed the alleged violations. If Plaintiffs simply alleged that Defendant  
6 violated a statute or regulation without further context, this would not be enough to  
7 put Defendant on notice. But that is not the case here.

8 As such, Defendant's argument regarding the failure to plead the actual  
9 statutes or regulations at issue fails at this stage.

10 Defendant raises the statute of limitations defense, ECF No. 20 at 6, but the  
11 allegation that Defendant has "failed to take adequate steps to control" the  
12 condition raises the inference that the alleged nuisance is ongoing and not barred  
13 by the statute of limitations. ECF No. 16 at 9, ¶ 2.

#### 14 **B. Nuisance**

15 In Washington, a nuisance includes "whatever is injurious to health or  
16 indecent or offensive to the senses, or an obstruction to the free use of property, so  
17 as to essentially interfere with the comfortable enjoyment of the life and  
18 property[.]" RCW 7.48.010. Nuisance is more specifically defined in RCW  
19 7.48.120:

20 Nuisance consists in unlawfully doing an act, or omitting to perform a duty,  
which act or omission either annoys, injures or endangers the comfort,

1       repose, health or safety of others, offends decency, or unlawfully interferes  
2       with, obstructs or tends to obstruct, or render dangerous for passage, any  
3       lake or navigable river, bay, stream, canal or basin, or any public park,  
      square, street or highway; or in any way renders other persons insecure in  
      life, or in the use of property.

4       As the courts in Washington have explained:

5       Despite this expansive definition, generally, an activity is a nuisance only  
6       when it “interferes unreasonably with other persons' use and enjoyment of  
7       their property.” *Tiegs v. Watts*, 135 Wash. 2d 1, 13, (1998) (citing *Jones v.*  
8       *Rumford*, 64 Wash. 2d 559 (1964)). In contrast, “[a] nuisance per se is an  
9       act, thing, omission, or use of property which of itself is a nuisance, and  
      hence is not permissible or excusable under any circumstance,” regardless of  
      the reasonableness of the defendant’s conduct. *Id.* (lead opinion by Smith,  
      J., writing for four justices) (citing *Hardin v. Olympic Portland Cement*  
      *Co.*, 89 Wash. 320 (1916)).

10      *Moore v. Steve’s Outboard Serv.*, 182 Wash. 2d 151, 155 (2014) (internal citations  
11      altered; brackets in original).

12      Notably, “[a]lthough a rather wide range of landowner activity could  
13      conceivably be declared illegal and thus considered nuisances as a matter of law  
14      because forbidden by law, in fact only a few distinct categories of such conduct  
15      have emerged from the cases.” *Moore v. Steve’s Outboard Serv.*, 182 Wash. 2d  
16      151, 156 (2014) (quoting *Tiegs v. Boise Cascade Corp.*, 83 Wash. App. 411, 418  
17      (1996) (quoting 8 Thompson on Real Property § 67.03(a)(1), at 94-95 (Thomas ed.  
18      1994))). The dividing line is whether the violation, “by its very nature, ‘is an act,  
19      thing, omission, or use of property which of itself is a nuisance, and hence is not  
20      permissible or excusable under any circumstance’” or whether the alleged violation



1 is merely “incidental to the gravamen of the[] complaint”. *Id.* at 156-157 (quoting  
2 *Tiegs v. Watts*, 135 Wash.2d at 13). For example, merely failing to obtain a permit  
3 to operate a business may not establish a nuisance per se claim where the  
4 “plaintiffs have not shown that the failure to obtain a permit is a nuisance at all  
5 times and under all conditions” such that the complained of conduct is merely  
6 “incidental to the gravamen of their complaint—that the business created  
7 objectionable noise, fumes, and traffic.” *Id.*

8 As with the negligence claim, Defendant contends that Plaintiffs’ nuisance  
9 per se claim must be dismissed because Plaintiffs do not identify the particular  
10 statute or regulation to which Defendant is not in compliance. ECF No. 16 at 10.  
11 For the reasons discussed above, the Court finds Plaintiffs have sufficiently pled  
12 their nuisance per se claim.

13 Defendant takes another stab at Plaintiffs’ nuisance claim in a footnote,  
14 contending:

15 Plaintiffs make no allegation (nor could they) that Simplot’s business is  
16 unlawful in and of itself. Further, they do not allege that any of Simplot’s  
17 alleged conduct falls within the “distinct categories” of actions that can  
18 constitute nuisance per se. Thus, even if Plaintiffs did identify a statute or  
19 regulation that Simplot allegedly violated, this claim would still fail as a  
20 matter of law.

ECF No. 16 at 11, n.3.

1 First, there is no requirement that Defendant’s business be unlawful in and  
2 of itself. *See Tiegs v. Boise Cascade*, 83 Wash. App. 411, 419 (nuisance stemmed  
3 from seepage of wastewater byproduct of lawful business); *Tiegs v. Watts*, 135  
4 Wash. 2d at 13 (“A person who conducts business or a plant lawfully and in the  
5 best manner practicable with a sound operation may still commit a nuisance if the  
6 operation interferes unreasonably with other persons’ use and enjoyment of their  
7 property.”); *Moitke v. City of Spokane*, 101 Wash. 2d 307, 329 (1984) (city’s  
8 discharge of raw sewage into the Spokane River was prohibited unless authorized  
9 by a permit), *abrogated on other grounds by Blue Sky Advocates v. State*, 107  
10 Wash. 2d 112, 120 (1986).

11 As to Defendant’s “distinct categories” argument, the Court finds  
12 Defendant’s footnote argument is markedly lacking to establish Defendant is  
13 entitled to dismissal. In any event, the complained of violation—excessive fugitive  
14 dust and emissions—is not merely “incidental to the gravamen of their complaint,  
15 but “by its very nature, ‘is an act, thing, omission, or use of property which of itself  
16 is a nuisance, and hence is not permissible or excusable under any  
17 circumstance.’” *Moore*, 182 Wash. 2d at 156-157 (citations omitted).

### 18 C. **Trespass**

19 Defendant contends that “Plaintiffs cannot state a cognizable claim for  
20 trespass because they attempt to base their claim on allegations of transitory,

1 fugitive, and intangible interferences with their property rights.” ECF No. 16 at  
2 12.

3 In Washington, to establish a claim for trespass in this context, the “plaintiff  
4 must show 1) an invasion affecting an interest in the exclusive possession of his  
5 property; 2) an intentional doing of the act which results in the invasion; 3)  
6 reasonable foreseeability that the act done could result in an invasion of plaintiff's  
7 possessory interest; and 4) substantial damages to the res.” *Bradley v. Am.*  
8 *Smelting & Ref. Co.*, 104 Wash. 2d 677, 690-91 (1985) (quoting *Borland v.*  
9 *Sanders Lead Co.*, 369 So.2d 523, 529 (Ala. 1979)). The Court in *Bradley*  
10 clarified that “[w]hen airborne particles are transitory or quickly dissipate, they do  
11 not interfere with a property owner’s possessory rights and, therefore, are properly  
12 denominated as nuisances” but “[w]hen, however, the particles or substance  
13 accumulates on the land and does not pass away, then a trespass has occurred.” *Id.*  
14 at 691.

15 Defendant argues the alleged invasions here are “transitory or quickly  
16 dissipate” and cannot be considered trespasses. ECF No. 20 at 10. In Plaintiffs’  
17 Response, Plaintiffs seemingly gloss over the first element—that the invasion  
18 affect an interest in the exclusive possession of property. *See* ECF No. 19 at 17-  
19 19. Plaintiffs simply identify alleged “regular and routine release of flies, dust,  
20 excess noise and foul and obnoxious odors which have invaded” Plaintiffs’

1 property. ECF No. 19 at 18. However, in Plaintiffs' Complaint, Plaintiffs allege  
2 damages due to "lost value in field crops due to excessive dust content", which  
3 suggests the dust is accumulating on the land and not merely transitory.

4 According, Plaintiffs' trespass claim survives Defendant's Motion to Dismiss.

5 **ACCORDINGLY, IT IS HEREBY ORDERED:**

6 Defendant Simplot Feeders, LLC's Motion to Dismiss (ECF No. 16) is  
7 **GRANTED IN PART AND DENIED IN PART.**

8 The District Court Executive is directed to enter this Order and furnish  
9 copies to counsel.

10 **DATED** October 29, 2019.



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*Thomas O. Rice*  
THOMAS O. RICE  
Chief United States District Judge